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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 626.

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,
Petitioners,

—against—

HENRY POLLAK, INC.,
Respondent.

REPLY BRIEF OF PETITIONERS.

FREDERICK H. KOSCHWITZ,
Counsel for Petitioners.

JOHN F. X. FINN,
VERNON C. RYDER,
Of Counsel.

THE COURT PRESS, N. Y. C.

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HENRY POLLAK, INC.,

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REPLY BRIEF OF PETITIONERS.

As to Respondent's Point I.

Respondent claims, on the alleged authority of *Conde* v. *Yorke,* 168 U. S. 642, that the instant case does not present a federal question. In *Conde* v. *Yorke,* however, the dismissal of the writ of error was expressly placed upon the ground that the plaintiff-in-error was not a person claiming a right or immunity under a federal statute. The plaintiff-in-error in that case was not, as here, the holder of a Government claim. He was, rather, a subsequent assignee who had been placed in possession of the fund by the claimant and sought to avail himself of R. S. 3477 for the purpose of striking down a prior assignment. He was defeated in the State Court and grounded his petition to this Court for a writ of error on the claim that he was a person deprived of a right or immunity under R. S. 3477. Obviously, the only person, other than the Government, who

can assert a right or immunity under R. S. 3477 is one of the parties to an assignment of a claim against the Government. Plaintiff in error in the *Conde* case, not having been such a person, the writ of error was understandably dismissed. The Court said that, in order that it might have jurisdiction, the title or right under the statute "must be a title or right of the plaintiff-in-error and not a third person only; * * *" (p. 648).

In the instant case, it is clear that the right or immunity claimed under the statute is the right or immunity of petitioners and not of a third person. Therefore, *Conde* v. *Yorke* is not in point.

No more in point is *Walworth* v. *Kneeland*, 15 How. 348, cited on page 5 of respondent's brief. There the plaintiff-in-error was seeking to free himself from a contract whose fraudulent purpose, according to his own claim, was to prevent competition in the sale of public lands. The Court, in dismissing the writ for lack of jurisdiction, said that while the fraud, if proved, should have barred enforcement of the contract, it did not constitute the setting up of "any right or title under an Act of Congress" (p. 352).

As to Respondent's Point II.

In his Point II, respondent again attacks the jurisdiction of the Court. He argues that the judgment below may be rested on two separate non-federal grounds, either of which is sufficient to sustain it. The argument is clearly unsound. An attempted assignment, made null and void by a federal statute, cannot be vitalized by ratification or estoppel; nor is it any the less void because it formed part of a larger transaction.

Doherty v. *Bartlett,* 81 Fed. (2nd) 920, 926-927; cert. denied 298 U. S. 676;
Pullman's Palace Car Company v. *Central Transportation Co.,* 171 U. S. 138, 149;
Thomas v. *Railroad Co.,* 101 U. S. 71, 86;
E. E. Taenzer & Co. v. *Chicago R. I. & P. Ry. Co.,* 191 Fed. 543, 551 (C. C. A. 6th).

Hence it would appear that respondent points to no non-federal ground on which to rest his judgment. Moreover the case of *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, mentioned at page 6 of respondent's brief, lays down this important qualification to the principle of law for which the respondent cites it as authority:

> "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain" (p. 164).

See also *Ward* v. *Love County,* 253 U. S. 17, at pp. 22-23.

In the *Enterprise Irrigation* case the Court dwelt upon the necessity that the non-federal question be not intertwined with the federal question. The instant case presents even a stronger situation in favor of jurisdiction. Here a determination of the federal question in petitioners' favor necessarily carries with it the destruction of subsidiary non-federal questions.

As to Respondent's Point III.

In this point of his brief respondent contends that where a state court of equity has obtained jurisdiction of the *res* it may dispose of the fund in complete disregard of R. S. 3477. This is directly con-

trary to the holding of this Court in *National Bank of Commerce* v. *Downie*, 218 U. S. 345. The cases which respondent cites in alleged support of his proposition do not bear him out. They may be grouped as follows:

1. Cases where the invalidity of the assignment under R. S. 3477 was expressly pronounced:

McGowan v. *Parish*, 237 U. S. 285, where, despite the invalidity of the assignment, the amount of an attorney's compensation was measured by the percentage called for by such assignment.

McKnight v. *U. S.*, 98 U. S. 179, where the Government was not permitted to recover, by way of counterclaim, money paid out under an invalid assignment because the money had been paid out on the strength of a receipt signed by the assignor.

2. Cases which were unsuccessfully urged upon this Court in *National Bank of Commerce* v. *Downie*, *supra*:

Price v. *Forest*, 173 U. S. 410;
Erwin v. *U. S.*, 97 U. S. 392;
Bailey v. *U. S.*, 109 U. S. 432;
Hobbs v. *McLean*, 117 U. S. 567.

3. Cases expressly turning upon the proposition that the claimant was a receiver invested with title to the fund, thereby converting the transaction into an assignment by operation of law. Consequently, under long established principles, the assignment was withdrawn from the ambit of the statute:

U. S. v. *Bocherling*, 185 U. S. 223;
Redfield v. *U. S.*, 27 Ct. Cls. 393;

McKay v. *U. S.*, 27 Ct. Cls. 422;
People's Trust Company v. *U. S.*, 38 Ct. Cls. 359.

To the foregoing cases, under this heading, may be added *Leonard* v. *Whaley*, 91 Hun 304, which was another phase of the litigation involved in *People's Trust Co.* v. *U. S.*, *supra*.

It is to be noted that in the instant case the receiver was not a general receiver of petitioner's property but a temporary receiver only. As such he was merely a custodian appointed by the Court to take possession of and preserve *pendente lite* the fund in litigation. No title passed to him. As was stated by this Court in *Grant* v. *Phoenix Ins. Co.*, 106 U. S. 429, at page 432:

> "* * * The possession of the receiver is that of the Court, and he holds, pending the suit, for the benefit of whomsoever it shall in the end be found to concern. Neither the title nor the rights of the parties are changed by his possession. He acts as the representative of the Court in keeping the property so that it may be subjected to any decree that shall finally be rendered against it."

To the same effect, see *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 236.

4. Cases which did not turn upon Section 3477:

Fortunato v. *Patten*, 147 N. Y. 277;
Oregon Steamship Co. v. *Otis*, 100 N. Y. 446;
Dulaney v. *Scudder*, 94 Fed. 6 (C. C. A. 5th);
Portuguese-American Bank v. *Welles*, 242 U. S. 7;
Richmond & Danville R. R. Co. v. *Gorman*, 7 App. Cas. D. C. 91.

5. And the following case involving an assignment akin to one by operation of law:

Roomberg v. *U. S.*, 40 Fed. Supp. 621.

In the *Roomberg* case the assignee was the sole stockholder of the assignor corporation. The so-called assignment took place as a result of the liquidation of the corporation. The Court held that the assignee, even before the assignment, was the beneficial owner of the assets of the corporation and hence that there was no real assignment and Section 3477 was not applicable.

It is further to be noted that Scotti of Monza's share of the refunds, amounting to approximately one-third of the total refunds in suit, never came into the hands of the receiver. (Defendant's Exhibits A and B; Min. pp. 3, 699.) Consequently, the Court never took possession of that portion of the *res*. This feature of the case is completely ignored by the respondent in the presentation of his Point III to this Court.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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